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IN THE

Supreme Court of the United States

October Term, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO.,
a Florida Corporation,

Petitioner,

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased

Respondent.

On Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The following abbreviations will be used:

R — Record
PC — Petition for Certiorari
PA — Petitioner's Appendix
RA — Respondent's Appendix

OBJECTIONS TO JURISDICTION

Aware that to invoke certiorari jurisdiction it must establish that the controlling issue in the State Court was a federal issue, the Herald has conjured up a Petition alleging the violation of the First and Fourteenth Amendments to the Constitution of the United States. A cursory review of the record discloses that Petitioner pays mere lip service to this jurisdictional requirement. The Herald attempted to raise a federal question at the outset by invoking the protection of Federal Amendment One in its Answer (R 7-35, 66-67). Neither in its Answer nor at any time prior to lodging its appeal did petitioner invoke the protection of the Fourteenth Amendment.[1] Reference to the Fourteenth Amendment appears first in petitioner's Assignments of Error — at a time when the Trial Court was divested of jurisdiction (R 858-859).

The absorption of Amendment One into the Fourteenth Amendment casually commenced with **Gitlow v. New York**[2] and has become accepted doctrine with subsequent decisions.[3]

As recently as **Smith v. California**,[4] Justice Black, concurring, stated:

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[1] No reference was made to the Fourteenth Amendment in its Motion for Directed Verdict (T. 728), nor its Motion of Judgment in accordance with Motion for Directed Verdict or for New Trial (R. 101-105).

[2] 268 U.S. 652 (1925).

[3] Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931); DeJorge v. Oregon, 299 U.S. 353 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940). Cf. Beauharnais v. Illinois, 343 U.S. 250 (1952) Jackson, J., dissenting 287-305. See also Roth v. United States, 354 U.S. 476 (1957).

[4] 361 U.S. 147 (1959).

> " . . . State intrusion or abridgment of freedom of speech and press raises a different question, since the First Amendment by its terms refers only to laws passed by Congress. But I adhere to our prior decisions holding that the Fourteenth Amendment made the First applicable to the States. See cases collected in the concurring opinion in Speiser v. Randall, 357 U.S. 513, 530, 2 L.Ed. 2d 1460, 1475, 78 S.Ct. 1332 . . . "

There is no authority for the converse proposition that the Fourteenth Amendment is absorbed into the First. Research fails to reveal any authority to uphold the Herald's position that by invoking the protection of only the First Amendment, it had with sufficient precision properly raised and preserved the safeguards of the Fourteenth Amendment.

Faced with a $100,000 judgment and knowing that Article V, Section 4(2) of the Florida Constitution provides:

> Appeals from Trial Courts as a matter of right may be taken directly to the Supreme Court . . . from Final Judgments . . . construing a controlling provision of the Florida or Federal Constitution

the Herald sought review in the local District Court of Appeal, Third District, rather than take direct appeal to the Florida Supreme Court. Petitioner did not then allege, as it does now, that "*important and unsettled questions*" concerning constitutional provisions should be settled (PC 18).

The Herald, through its President and Publisher, first disparaged the Florida Supreme Court to the jury, then manifested its intention to seek ultimate review in the Supreme Court of the United States should it lose in the Florida Courts.[5] (R. 437-438). Desiring to expedite litigation pending since 1957, respondent petitioned for transfer to the Florida Supreme Court, citing Mr. Knight's testimony and Point V of the Herald's Brief on Appeal which argued constitutional provisions. (R. 867)

The District Court transferred the cause to the Florida Supreme Court (R. 881, PA 1A). After hearing two oral arguments the Florida Supreme Court, citing **Beauharnais v. Illinois,**[6] and **Layne v. Tribune Co.** (Fla. 1933,[7] retransferred to the District Court, holding "the trial court did not construe a controlling provision of the Florida or Federal Constitution."[8] (PA. 3a)

We recognize that if properly raised, the misapplication rather than misconstruction of a controlling constitutional provision could justify certiorari. In reviewing the Herald's appellate strategy we seek to establish that it has suddenly adopted a position heretofore avoided

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[5]R. 437: "I don't think many of us look to the Florida Supreme Court as the last opinion in legal matters."

R. 438: "Q. Do I understand that you as editor of this paper don't feel that the Florida Supreme Court has the last word with reference to matters such as Florida Grand Jury, the function of the courts in Florida, what may or may not be defamation, or what may or may not be retraction?

A. I am referring to the situation that I mentioned before.

Q. I am referring to this case here, sir?

A. Well, we'll see where this leads."

[6]343 U.S. 250 (1951).

[7]146 So. 235, 238 (Fla. 1933).

[8]Miami Herald Publishing Company v. Brautigam, 121 So. 2d 431, 432 (Fla. 1960).

by its present contention that "important and unsettled" constitutional questions should be settled. (PC 18)

We respectfully submit: First, that no substantial federal question is involved herein.

In **Beauharnais v. Illinois** this Court stated:

> ". . . Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. 'There are certain well-defined and narrowly limited class of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words— those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. . . . Such were the views of a unanimous Court in Chaplinsky v. New Hampshire, supra."[10]

Second, the federal question had not been properly raised in the State Courts. The trial court was never afforded the opportunity to consider and decide the applicability of the Fourteenth Amendment since that constitutional provision was not invoked prior to appeal.

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[9]343 U.S. 250, 255 (1951). In Mr. Justice Jackson's dissent is contained a lengthy discussion of this point.

[10]315 U. S. at 571, 572. *Chaplinsky* is also cited in the opinion now sought to be reviewed at 127 So. 2d, page 322. See also Near v. Minnesota, 283 U.S. 697 (1931).

Third, assuming arguendo a substantial federal question was invoked in the judgment sought to be reviewed, and had been properly raised, still this Court should not grant certiorari because the judgment can be sustained on independent grounds of Florida law. In a defamation action, there is no defense to a libel published with actual malice.[11]

QUESTIONS PRESENTED*

1. Whether the editorials constitute fair comment as a matter of law?

2. Did the jury finding of actual malice vitiate the defense of fair comment?

3. Whether the petitioner's rights as guaranteed by the First and Fourteenth Amendments of the United States Constitution were violated

a) by the admission into evidence of the judicial opinion which the trial court termed "relevant";

b) by the court's charge to the jury that if the editorials were not free from imputations of dishonorable or corrupt motives, the defendant exceeded the bounds of fair com-

[11]The only exception is in the case of absolute privilege not involved herein.

*Assuming arguendo that (i) petitioner's federal question is substantial; (ii) that it was properly raised in the Florida court; and (iii) that there is no independent State ground on which the instant decision can rest, the issues then presented to this Court by the Herald's petition are as stated herein.

ment without further charging as to the right to make such imputations when reasonably inferred from facts truly stated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions set out in Petition for Certiorari, the instant case also involves Section 4 of the Declaration of Rights, Florida Constitution: (RA 1)

> SECTION 4. Courts open to everyone; remedy for wrongs. — All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

Not directly involved but relevant are the following constitutional and statutory provisions:

Article V, Section 4(2) of the Florida Constitution which sets forth the jurisdiction of the Florida Supreme Court:

Article IV, Section 15, of the Florida Constitution Removal or Suspension of Officers. (RA 1)

Florida Statutes 1955:

Section 770.01 — Notice condition precedent to action or prosecution for libel. (RA 2).

Section 770.02 — Correction, apology, or retraction by newspaper. (RA 3)

Section 905.19 — Duty of prosecuting attorney. (RA 3)

Section 925.01 — Penalty for failure to perform duty required of officer. (RA 4)

STATEMENT OF THE CASE

Petitioner's version of the facts contains material omissions.

Prior to 28 April 1956 George A. Brautigam, the State Attorney, now deceased, enjoyed an unblemished reputation for being an honest, capable public official (R. 477, 634, 639, 651, 658, 667, 674, 686, 693, 703, 709, 714, 719). After said date he was regarded by the public with distrust, contempt, ridicule and hatred. He and his family were personally avoided. He was injured in his office and profession. (R. 245 et seq.) The two editorials published by the Herald, forming the basis of this suit, wrought the instant change. (R. 641-45, 687-90, 695, 700, 710-12, 720). Defendant supported plaintiff in his successful campaign for State Attorney in 1952 and thereafter remained friendly toward him until he moved to suppress the Interim Report of the Grand Jury. (Ex. A) (R. 419, 469-470). After that event, as a result of the publications in defendant's newspaper, (Ex. 1-15), public confidence in Brautigam was destroyed.

The Herald also supported Circuit Judge George E. Holt in his 1952 campaign for reelection. Shortly there-

after the Herald became "increasingly conscious" of Judge Holt's shortcomings (R. 581).[2] In December of 1955 Judge Holt was involved in a notorious automobile accident (Ex. 10, R. 587). At that point the Herald came to the conclusion that the Judge had outlived his usefulness and that he should step down—either voluntarily or otherwise (R. 607-608). The Grand jury publicly sent a delegation to witness the trial of Judge Holt. (Ex. 10). Alice Ward, an employee of the Herald and also a member of that same Grand Jury, is the wife of the man in charge of that department of the Herald which puts all stories in final form and drafts headlines—Herald "News Editor" Charles Ward (R. 395, 396, 517, 580). Shortly after the Holt trial, State Attorney Brautigam was requested by the Grand Jury to appoint Attorney S. D. Weissbuch to aid them in a particular investigation (R. 197). In response to plaintiff's inquiries, Weissbuch falsely stated that he knew none of the parties or the subject matter of the investigations when, in fact, he had just previously appeared before the Grand Jury as a witness (R. 256-58). Weissbuch was publicly accused without contradiction of having nursed a personal hatred for Judge Holt, and that he had avowed to "get even with him" (Ex. 15). Pursuant to Sec. 27.18 Florida Statutes (A. 3) upon the recommendation of Brautigam, Weissbuch was appointed an assistant to the State Attorney (R. 200). (Defendant's Ex. 1). When Brautigam observed that Weissbuch was conducting the investigation contrary to ethics and law,

[2] It is of more than passing interest or even irony that the editor whose article pen provoked the famous Pennekamp v. State of Florida case, 328 U.S. 331 is the same John Pennekamp who drafted the editorials which are the subject of this suit. It is noteworthy and of tremendous significance that the Judge Holt referred to in *Pennekamp*, id. at 337 fn 4, is the same Judge Holt whose notorious automobile accident while fleeing from the police actuated the Grand Jury investigation culminating in the illegal Grand Jury report.

he admonished him in the presence of the Grand Jury (R. 201). The Grand Jury sided with Weissbuch and Brautigam was "told to get out and stay out" (R. 201). Shortly before the Interim Report was to be filed, Grand Juror and Herald employee, Alice Ward, twice sent word to the Herald's Managing Editor, George Beebe, to hold front page space (R. 517).

Brautigam was then engaged in a campaign for reelection to be held on 8 May 1956 (R. 225). Having been a "satisfactory state attorney", (R. 592) the Herald was going to support him for reelection (R. 565).

On 26 April 1956 the Grand Jury, in the presence of Judge Floyd, gave Brautigam a copy of the Interim Report to examine (R. 204). Explaining why he considered the report illegal, Brautigam offered to redraft the document in accordance with law (R. 204). He was again asked to leave (R. 204).

Later that day, Brautigam was advised that the Grand Jury was going to file the Report and his presence was requested (R. 205). He was handed a copy of the same Interim Report of which only the last page had been changed (R. 205). Brautigam requested that the court withhold filing of the report until he had the opportunity to file a motion stating why the report was invalid and should not become part of the public records. The court granted his request and set time for argument at 2:00 P.M. Monday, 30 April 1956 (R. 205-206).

John Pennekamp, the Herald's editor, and other members of its staff were well aware that the contents of the Report concerned Judges Holt and Prunty and several

members of the bar, even though it was officially still secret (R. 528, 543). Brautigam's action touched off a chain reaction by defendant towards him which from that moment was to plague and harass him almost to the day of his death (Exhibits 1-15).

On Friday, 27 April, the Herald published a front page double banner headline devoting three columns to petitioner's action (Exhibit 2):

BRAUTIGAM BLOCKS GRAND JURY REPORT;
PANELISTS WARNED ON PHONE TO LAY OFF

AT LEAST FIVE TOLD TO 'BEWARE'
"Someone Knew" About 'Hot' Blast

By Ronald York
Herald Staff Writer

ATTORNEY ENTERS BID TO SUPPRESS IN CIRCUIT COURT

By J. L. (Dixie) Smith,
James Miller and
Lawrence Thompson
Herald Staff Writers

Plaintiff's picture appeared on the same page over the captain and headlines:

GEORGE A. BRAUTIGAM . . . holds up report.

Ronald York, who wrote the "Beware" story believed that fellow employee, Luther Voltz, had advised him to contact Grand Juror Mrs. Livesay, the source of the sinister story (R. 394). York admitted having previously stated "I knew Alice Ward was a grand juror and I have talked off the record with her many times." (R. 442)

Friday, 27 April 1956, Brautigam filed his Motion to

Suppress, setting forth with particularity the reasons why the Report was legally insufficient (Ex. 1) It also stated that neither Brautigam nor any members of his staff were involved A copy of said motion was distributed to all news media, including Dixie Smith, the Herald's Court House Reporter (R. 330). Dixie Smith testified that despite the fact that he had reported that neither Brautigam nor any of his assistants were involved in the Interim Report, that part had been deleted from his story that was published on the front page of the Herald on Saturday, 28 April (R. 332-333) (Ex. 3). Instead, in that same edition, a picture of Brautigam handing his Motion to Judge Floyd was published with the caption and story: "Wearing a Worried Look, State Atty. George A. Brautigam stands by while Circuit Judge Robert Floyd reads Brautigam's motion to suppress the Grand Jury report Friday . . . " (Ex. 3 p. 5B).

In the middle of the Dixie Smith story there appeared a prominently displayed cross reference (R. 580, 583), "Why Does State Attorney Muzzle the Grand Jury? See editorial on Page 6A" (Ex. 3). On Page 6A a cartoon entitled "WHY, GEORGE?" appeared depicting Brautigam holding a gag across the mouth of the Grand Jury (Ex. 3). Conspicuous because of its unusual format, (R. 447, 597) appeared the first editorial upon which this suit is based. (Ex. 3)

On that Saturday, 28 April, Brautigam, in the company of some of his assistants, visited defendant corporation and held a conference with Managing Editor Beebe, and Reporters Voltz and Collier (R. 224 et seq.; 478 et seq; 367 et seq; 631 et seq). Brautigam voiced his objections to the unfair manner in which his actions were

being reported and particularly objected to the editorial and cartoon. Excerpts from the majority opinion in **In Re Report of Grand Jury**, 14 So.2d 316 (Fla. 1943), (hereinafter referred to as the **Grave's Case**) were read to Editor Beebe to convince him that the newspapers were in error when they stated that his Motion to Suppress (Ex. 1) was based upon a dissenting opinion (R. 226-227, 632, 633). Brautigam offered to pay the regular advertising rate to have his Motion published so that the public might know his side of the story (R. 226, 632). Brautigam (R. 227) and former assistant (R. 632) testified, in contradiction of Beebe (R. 527), that Beebe had promised to publish Brautigam's Motion in full, without cost.

On the front page of the Sunday Herald, 29 April 1956, appeared the false headline (Ex. 4 R. 364):

"DIGS UP '43 INCIDENT

High Court Upset Case Brautigam Cited"

On the witness stand, Beebe admitted the falsity of the headline (R. 364-365). Late Sunday evening, Brautigam read the early morning, Monday, 30 April, edition of the Herald (R. 239). The Herald had failed to publish his motion. On the front page appeared an unfavorable story by Ronald York which, among other things, in bold type stated that Brautigam's Motion was based upon a dissenting opinion.

On page 6A appeared the second editorial upon which the Complaint was based (Ex. 5, PC 11). On that same Sunday evening, Brautigam immediately sent a telegram to the Herald in care of Managing Editor Beebe remind-

ing him that he had relied upon his promise to publish the Motion. He demanded fair treatment and a retraction. (Ex. 7, R. 239).

York testified that he did not know, in fact, whether Brautigam had actually relied upon a dissenting opinion but that he had been instructed by one of his superiors to write the type of story that appeared (R. 409).

On Monday, 30 April Brautigam's Motion was heard in open court; it was denied, and the report was spread upon the minutes (R. 230-231).

On 3 May 1956, buried on page 10B, the Herald published an abridged account of Brautigam's position as set forth in his Motion (Ex. K). The Miami Herald endorsed Brautigam's opponent, Richard E. Gerstein (R. 425, 469-70). On Tuesday, 8 May, Brautigam was defeated for reelection (R. 225). Plaintiff appealed the order of Circuit Judge Floyd (R. 231). On 27 December, just as plaintiff was about to leave office, the "Tipoff" column of the Herald falsely reported that plaintiff . . . "may drop law business altogether and join an insurance firm" (Ex. 14).

On 27 February 1957, the Supreme Court reversed Circuit Judge Floyd and expunged the Interim Report. **State v. Interim Report of Grand Jury**, 93 So.2d 99 (Fla. 1957) (Ex. 6). On 28 February 1957 the Herald reported the Supreme Court decision as a victory for Judge Holt (Ex. 11) and published a critical editorial regarding the Supreme Court opinion (Ex. 12).

On 18 October 1957 the Herald carried a front page headline story that Richard Gerstein, Brautigam's suc-

cessor, had been severely criticized by a subsequent Grand Jury. Again Brautigam was in no way involved; on the front page below a picture of Gerstein appeared a picture of the plaintiff with the false caption: "George Brautigam . . . jury target before." (Ex. 8) The editors of the Herald admitted that they knew that this was not true, but refused to correct the false statement (R. 356, et seq. 569).

On 14 February 1958 the jury awarded plaintiff $25,000.00 compensatory damages and $75,000.00 punitive damages (R. 854). George Brautigam died on 17 August 1958.

REASONS FOR DENYING THE WRIT

1. **Jurisdiction to this court will not lie because there is no substantial federal question.** See Objections to Jurisdiction, supra, p. 2-6.

2. **The editorials did not constitute fair comment as a matter of law.**

As a matter of law, the editorials exceeded the bounds of fair comment.[13] Filing no Motion to Dismiss, the Herald conceded the publications were libelous per se. Petitioner has yet to contend that the editorials were not defamatory. Not only did the editorials impugn Brautigam's motives and hold him up to scorn, ridicule and contempt, but they actually charged him with a crime for which he could have been removed from office,[14] fined and imprisoned.[15]

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[13] See argument under Point 4(b) infra, p. 25-29.

[14] Sec. 15, Art. IV, Fla. Const., RA 1-2.

[15] Sec. 925.01 Florida Statutes, RA 3. *See Ex Parte Amos*, 112 So. 289 (Fla. 1927).

deed, the second editorial flatly stated that the Governor should remove him from office. (Ex. 5, PC 11)

Petitioner here contends that, notwithstanding the defamatory nature of its publications, under the doctrine of fair comment it is immune from liability.

Summarized with the emphasis as it appeared, the editorials stated:

First Editorial (Pl. Ex. 3, PC 10):

> **"People Have The Right To Know . ... Why does State Attorney Muzzle the Grand Jury?** . . . throwing a road block . . . Is he afraid of something, or of someone? . . . Is he trying to protect someone? . . . the state Attorney has invited both questions . . . His office, however, is not above the Grand Jury's attention . . . people's rights are in jeopardy . . . Brautigam is off the track of his public responsibility . . . We think the judge should have told him so . . . he invites suspicion . . . He can remove it only by reversing his course . . . Brautigam . . . has run out on them . . . Who will speak for the people . . . ?"

Second Editorial (Pl. Ex. 5, PC 11):

> **"Who will represent the Public? . . . State Attorney Brautigam Runs Out On The People . . .** Who will represent the people . . . they have been blocked . . . Brautigam . . . not the servant of the people . . . He ran out on them . . . The . . . Grand Jury Association should get in touch with

> Governor Collins . . . point out that Brautigam turned his back on the people . . . as well as on his job . . . and appoint his replacement."

Examining the editorials in relation to the evidence and utilizing the yardstick advocated by the Herald, (R. 807) the defense of fair comment was not established.

a. The editorials dealt with a matter of public interest and concern.

This we concede, and at the request of respondent the jury was so charged (R. 839, RA 7-8).

b. The editorials were not based on facts truly stated.

It was adjudicated that when Brautigam moved to suppress the illegal portions of the Grand Jury Report he did not "run out" or "turn his back" on the people; that he was not "afraid of something or someone;" that he was not illegally "protecting someone" (or that he was guilty of malfeasance, misfeasance or neglect of duty and subject to replacement).

The Herald well knew prior to the time it published the first editorial that Brautigam was not involved in the report (R. 224 et seq., 475 et seq., 805 et seq., 832). But however, instead of publishing that fact as Doyle admitted had written it (R. 832-833), the Herald (R. 874, 876-880) deleted that material item and inserted its own "code key" (Ex. 2) thereby suppressing a legitimate fact so that its front page news would be consistent with its editorial policy. The Herald also failed to report that

Brautigam had moved to suppress only that portion of the Interim Report which he considered illegal (Ex. 1, Par. 4); it also failed to report that his motion stated that if the subjects of the report had violated any law that they should have been indicted (Ex. 1, Par. 6).

That the editors of the Herald appreciated that a question can be so framed as to indicate a fact was brought to the attention of the jury.[10] (R. 429)

c) All the Statements of which the Plaintiff Complains were Not Expressions of Opinion.

No person reading the editorials could conclude other than that it had been dramatically uncovered that Brautigam was a corrupt public official who had violated his oath of office and that the Governor should remove him (Ex. 5, PC 11); that he should be avoided by decent people; forever barred from a position of public trust. The editorials are classic examples of libel per se. No ordinary person would be likely to understand the editorials as a mere expression of the writer's opinion as contrasted with a direct statement of existing facts. The sting of the libel—the lingering thought, the aftermath, is that Brautigam had been unfaithful to his office.

Editor Pennekamp admitted that "Who is he trying to protect" is a statement of fact. (R. 570) The word "protect" when used of a prosecutor is understood by everyone to imply bribery and corruption in office.

[10] "Mr. Knight: What will I do when the questions are loaded?
The Court: You may ponder them before you answer them."
See Burnham v. Hornaday, 130 Misc. 207, 223 N.Y.S. 750 (1927).

d) The Editorials Imputed Corrupt or Dishonorable Motives To The Plaintiff.

Defendant's contention that the editorials failed "to show any imputation of corrupt or dishonorable motives on the part of the plaintiff" (PC 27) does not warrant reply. The editorials speak for themselves. (Exs. 3, 5).

e) The Editorials Did Not Represent the Honest Expressions of the Editor's Opinion.

At the time Editor Pennekamp drafted the editorials it was not his honest opinion that George A. Brautigam was a corrupt public official who had committed an act which subjected him to criminal prosecution or removal from office.[17] In his judgment, "George Brautigam was a man of honesty and integrity" (R. 612) and if he had reversed himself, he implied he would have been endorsed for re-election. (R. 565) Feeling Brautigam had used bad judgment, (R. 549) the editor never intended to infer that he had any sinister or ulterior motives. (R. 550)

Without compunction, Pennekamp admitted that the editorials were written with the singular purpose of influencing Brautigam in his official duties (R. 599, 601, 613, 620): "I had hoped they would bring George back on the right track, the team he had deserted, but they didn't so there was no effect."[18]

Knowing the contents of the report and that Brauti-

[17] See Section 925.01 Fla. Stat. 1955 (RA 3), Constitution of Florida, Section 15, Article IV (RA 1-2).

[18] *Cf.* This admission with Editor Pennekamp's sworn answer in Pennekamp v. Florida that his "purpose was not to influence the Court" 328 U.S. 331 (347).

gam was not involved; (R. 543, 566) having concluded that former friend, Judge Holt should step down from the Bench—voluntarily or otherwise; (R. 581, 582, 584, 586-588, 606, 607, 608, 609, 610) knowing Brautigam to be an honest public official who at worse had used bad judgment; (R. 549, 550, 603) and wanting the report to be made public regardless—legal or illegal, (R. 575-576) can it be seriously argued that the editorials were an honest expression of Editor Pennekamp's opinion?

3. **The jury finding of actual malice vitiated the defense of fair comment.**

"Privilege is never an effective cloak for malice."[1] The Herald concedes that actual malice defeats the defense of fair comment. (PC 23) In opening statement the jury was informed that Brautigam would prove that the ill will—actual malice—of the Herald towards him was actuated because he stood in the way of other plans of the newspaper. (R. 162-164) Able defense counsel immediately challenged plaintiff's theory. (R 175) In closing argument he kept the issue crystal clear (R. 783, 806):

> ". . . . I will reaffirm what I told you the day I stood before you when we started this case. And I will reaffirm it to you just as steadfastly as I know how. And that is, if you believe that The Miami Herald newspaper was willing to crucify the plaintiff to get to Judge Holt, then I deserve to lose."

[1] Caldwell v. Crowell-Collier Pub. Co., 161 F.2d 333 (5th Cir. 1947).

> "If you think the Miami Herald had it in for George Brautigam, or if you think that they were perfectly willing to do the most unethical thing that anybody could do, to crucify an innocent man to get to a judge, that is what you have to find if you are going to bring in any punitive damages in this case; and then you are going to punish the Miami Herald. That is the idea, punish them.'"

For the jury's consideration Brautigam adduced overwhelming evidence of actual malice:

The editorials per se were a scathing denunciation of Brautigam and the effects therefrom followed him into his private life. (R. 641, 687, 695, 700, 710, 720) The excessiveness of the language is evident. They bristle with malice.

The editors admitted having published two falsehoods concerning Brautigam. On several occasions he requested retractions. (R. 356 et seq. 364-5, 569) The Herald not only refused to retract, but failed to correct acknowledged falsehoods. (R. 137, 440). In the light of the Supreme Court opinion[3] the Miami News apologized to Brautigam (Ex. 13); the Herald criticized the decision. (Ex. 12) Section 770.02, Florida Statute (1955) (RA 3) gives a newspaper opportunity to escape punitive damages by publishing a full and fair retraction. The Herald elected to remain adamant and let a jury determine the issue of

[3] State ex rel Brautigam, 93 So.2d 90 (1957).

actual malice. Failure to retract has consistently been ruled evidence of actual malice.[21]

The repetitious defamations, accusatory headlines and captions, deletions of exculpatory news and other facts heretofore related were evidence of actual malice. The jury, believing the evidence, found that the Herald had willingly crucified Brautigam to get Judge Holt. Taking its counsel at his word, the jury punished the Miami Herald.

4. The Petitioner's rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution were not violated.

(a) The admission into evidence of the judicial opinion. (Interim Report Opinion)

Petitioner cites the four (4) Grand Jury cases[22] to support its contention that the Florida Supreme Court without warning abruptly reversed itself and declared a "new and different rule of law in regard to Grand Jury reports.[23] (PC 26) We submit that such an issue is beyond the scope of the review.[24]

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[21]Metropolis Co. v. Croasdell, 145 Fla. 456, 199 So. 568 (1941); Ross v. Gore, 48 So.2d 412 (Fla. 1950); and Miami Herald Publishing Co. v. Brown, 66 So.2d 679 (Fla. 1953).

[22]In Re Report of Grand Jury, 152 Fla. 154, 11 So.2d 316; Owens v. State, Fla. 59 So.2d 254; Ryon v. Shaw, Fla. 77 So. 2d 455; State ex rel Brautigam v. Interim Report of Grand Jury, 93 So.2d 99 Fla. (1957).

[23]It is noted that in Appellant's Brief below (AB 43) in commenting on the same point, the Herald stated that the Florida Supreme Court "merely clarified and distinguished early precedent".

[24]Long before the interim Grand Jury report, the Florida Supreme Court had made clear pronouncements on the subject, and did not, as the Herald suggests, conveniently or unpredictedly change the law to protect a fellow Judge.

In Florida it is held that the test of admissibility is relevancy; the test of inadmissibility is lack of relevency.[25] In admitting **State ex rel Brautigam**[26] the trial judge *inter alia*, stated, "the court rules that it is relevant." (R. 235-236)

Petitioner speciously contends that since the law concerning Grand Jury reports was different at the time of the editorials than at the time of the trial, it was error for the jury to hear evidence proving that Brautigam legally moved to suppress the report. Such a contention is *reductio ad absurdum*. The issue petitioner fails to grasp is that regardless of the law concerning Grand Jury reports, the editorials were libelous per se as of the day they were written. Brautigam was defamed as of the day they were published — not at the time the court rendered the Interim Report decision. If Brautigam had never appealed the ruling of the assignment judge, he had been no less defamed. If Judge Floyd had been affirmed, the editorials were no less defamatory. The admission of the opinion did not prove the defamation. The editorials proved that. The opinion refuted the defense of justification. Truth and fair comment are not dependent upon the law respecting Grand Jury reports.

Petitioner has been less than candid. Although never assigned as error, (R. 858-859) it now complains of the refusal of the trial court to accept the illegal and expunged Grand Jury report into evidence. Petitioner fails to make reference to its introduction into evidence of i) the **Graves** opinion, (Ex. B) ii) Brautigam's Motion to Suppress, (Ex. C) iii) Judge Floyd's instructions to the Grand Jury,

[25] Williams v. State, 110 So.2d 654, 660 (Fla. 1959).
[26] 93 So.2d 99 (Fla. 1957).

(Ex. J, R. 293-4) iv) the Petition and Order appointing Weissbuch, (Ex. I) or v) the reading of the **Ryon** opinion to the jury. (R. 803) The **Graves** opinion and Brautigam's Motion were placed in juxtaposition before the jury and Brautigam was exhaustively cross-examined on a comparative analysis. The introduction into evidence of these decisions and legal documents evidence and corroborate an undeniable fact — the most important issues in controversy during the trial involved questions of fact concerning legal propositions. Considering that the editorials concerned legal propositions, it is not startling that the trial involved those very same issues, or that Brautigam should attempt to justify his legal position by citing law on that subject from the highest state tribunal.

Thus it can be seen that the opinion was an integral and necessary part of the trial: (1) It was relevant to refute the defense of justification. As a matter of law and of fact the high court held that Brautigam had the legal right to move to suppress the Report and had not been unfaithful to his office. (2) It corroborated the contention of Brautigam (a) that the Report was illegal and should not have been published; (b) that if the Report were true, the persons should have been indicted. (3) It proved the falsity of the headline, "High Court Upset Case Brautigam Cited" (Ex. 4). (4) It proved the falsity of the charge that Brautigam had relied upon a dissenting opinion (Ex. 5). (5) It was evidence that Brautigam had not "protected" anyone. (6) It evidenced malice. It reflected the obdurate attitude of the Herald and its wantonness in refusing to retract in the light of the opinion rendered

weeks before suit was filed. (7) It was the final chapter in the history of the controversial report."

(b) **The court correctly charged the jury that if the editorials were not free from imputation of dishonorable or corrupt motives, the defendant exceeded the bounds of fair comment, without further charging the jury as to the right to make such imputation when reasonably inferred from the facts truly stated.**

Lifting from context a few lines from the court's instructions on defamation, petitioner argues that the jury was instructed "that the one who imputes improper motives to a public official is absolutely liable (PC 27). Respondent denies the accuracy of that allegation. Without further comment, reference is made to the trial court's instructions on defamation, incorporated *in toto* in the Appendix herein (RA 4-18) so that they may reviewed from their four corners.

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[26] In *Chaplinsky v. New Hampshire*, 315 U.S. 567, 574, the Court stated:

> "The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment."

Mr. Justice Harlan, concurring in part and dissenting in part, in *Smith v. California*, 361 U.S. 147, 172, stated:

> "I know of no case where this Court, on Constitutional grounds, has required a State to sanction a particular mode of proof."

The trial court instructed the jury in regard to the law of defamation, liberally paraphrasing Federal Judge Simpson's instructions in **Curtis Pub. Co. v. Fraser**, 209 Fed. 2d 1, 5th Cir. Fla. (1954). That case was reversed mainly because Judge Simpson instructed the jury that the burden on the issue of malice in connection with fair comment was upon the defendant publisher. Judge Herin did not make the same mistake and petitioner does not contend that he did. Judge Simpson's instructions can be found in Volume II, Transcript of Record, U. S. Court of Appeals, 5th District, #14279, **Curtis Pub. Co. v. Walter B. Fraser, supra.**

Florida, along with the majority of jurisdictions, has refused to extend to the press the privilege (immunity) to publish to the world false statements of fact or imputations of corrupt motives concerning public officials, if such false statements or imputations are the honest belief of the published and are warranted by the facts truly stated.

As far back as the Reconstruction era, the Florida Supreme Court in **Jones, Varnum & Co. v. Townsend's Administratrix**,[27] one of the cornerstones of the American law of defamation, cited by this Court in **Near v. Minnesota**,[28] set forth the permissible limits of fair criticism of a public officer:

> " . . . The official acts of a public functionary may oe fully criticized . . . but the occasion will not of itself excuse an attack upon the character and motive of the officer; to excuse

[27] 21 Fla. 431, 452 (1885).
[28] 283 U.S. 697, 719 (1931).

> this the critic must show the truth of what he has uttered. To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives, . . . "

The Florida Supreme Court has never deviated from that decision.[29] In **State ex rel Arnold v. Chase,**[30] the Court emphatically reaffirmed the legal limits of fair comment:

> "The comment or criticism must be fair and free of malice. * * * The privilege does not embrace the right to make false statements of fact, to attack the private character of public men or falsely to impute to them a want of loyalty or misconduct in office * * *"[31]

It is to be noted that generally imputations of corrupt motives are classified as statements of fact,[32] on the rationale that "the state of a man's mind is as much a fact as the state of his digestion.[33]

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[29]Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1881); Jones v. Greeley, 25 Fla. 629, 6 So. 448 (189); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270 (1917).

[30]114 So. 857 (Fla. 1927).

[31]For cases of similar import see McCtarty v. Post Pub. Co., 109 Fla. 93, 147 So. 259 (1933); Metropolis Co. v. Croasdell, 145 Fla. 456, 199 So. 568 (1941); Richard v. Gray, 62 So.2d 597 (Fla. 1953); Walsh v. Miami Herald, 80 So.2d 669 (Fla. 1955).

[32]Negli v. Farrow, 60 Md. 158, 45 Am.Rep. 715 (1883); Sherman v. International Pub. Co. 214 App.Div. 437, 212 N.Y.Supp. 478 (1st Dept. (1925)); Streeter v. Emmons County Farmers Press, 57 N.D. 438, 222 S.W. 455 (1928); Belo & Co. v. Looney 112 Tex. 760, 346 S.W. 777 (1922); Kinsley v. Herald, 113 Vt. 272, 34 A.2d 99 (1943).

[33]Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1882).

The great weight of American authority is to the effect that false statements of fact concerning a public officer, or the imputation to him of corrupt motives is not privileged as fair comment.[14] Florida subscribes to that majority view.[15]

In the instant decision the Third District Court of Appeal reaffirmed Florida's historical alignment with the majority: (PA 13a)

> "The great majority of American courts hold that no comment can be fair if it is based on misstatements of fact. See Noel, 'Defamation of Public Officers and Candidates,' 49 Colum.L.Rev. 875, 896. We concur in this view and align ourselves with the majority.
>
> The appellant urges that we reverse the trial court and adopt a rule by which corrupt or dishonorable motives may be imputed to others *where such imputations are warranted by the facts*. Such a construction of the defense of fair comment has been accepted in England and a minority of American courts. See Gatley, Libel and Slander, 4th Ed., p. 329, and Foley v. Press Pub. Co., 1929, 226 App. Div. 535, 235 N.Y.S. 340. Cf. Rathkopf v. Walker, 190 Misc. 168, 73 N.Y.S. 2d 111 and 274 App.Div. 1064, 85 N.Y.S. 2d. 351.

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[14] A. H. Belo & Co. v. Looney, 12 Tex. 760, 246 S.W. 762, 783. See also Prosser, Torts, 662 (2 ed. 1955); Bover, Fair Comment, 15 Ohio St. L.J. 280, 290 (1954); Newell, Libel & Slander, 4th Ed., Comment, 62 Harv.L.J. Rev. 1207, 1209 (1949); Noel, Defamation of Public Officers, 49 Colum. L. Rev. 875, 881 (1949); Comment, 12 U. of M. L.Rev. 89 (1957); 110 ALR 412; 150 ALR 358.

[15] 110 ALR 412, 150 ALR 358, 359, Doctrine of Privilege or Fair Comment as applicable to misstatement of fact in Publication (or oral communication relating to public officer or candidate for office).

It is our opinion that the better view supports the holding that the defense does not embrace the right to falsely impute one's motives, want of loyalty or misconduct in office. See State ex rel. Arnold v. Chase, supra; Jones v. Townsend's Administratrix, supra; and McClellan v. L'Engle, 74 Fla. 581, 77 So. 270." (Emphasis by the Court) To excuse such an attack, the critic must show the truth of what he has uttered."

Space does not permit quotations from the two leading cases favoring the majority rule written by two famous jurists. See Holmes, J., in **Burt v. Advertiser Newspaper Co.**[47] and Taft, J., in **Post Pub. Co. v. Hallam.**[48]

5. Libelous utterances are not within the area of constitutionally protected speech.

The right of free speech is an American concept without dissent. From the beginning it was limited by state laws.[48] Urging a "uniform law of defamation" by judicial fiat, petitioner would have this Court reverse its historical position and render an opinion as revolutionary as **Erie R. R. v. Tompkins**[49]. Petitioner suggests no sound reason why this Court should reverse the long established

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[47]154 Mass. 238, 242, 28 N.E. 1 (1891).

[48]59 Fed. 530, 540 (C.C.A. 6th 1893).

[48]Thomas Jefferson's first draft of the 1776 Virginia Constitution bears witness to painstaking care taken to assure each citizen redress in the Courts of Virginia for injury caused by abuse of the press. (Papers of Thomas Jefferson, Vol. I, 344, (Princeton 1951));

"Printing presses shall be free, except (*so far as they or their managers shall be subject themselves to the private action of any individual*) where by commission of private injury; they shall give cause of private action."

[49]304 U.S. 64 (1938).

rule that libelous utterances are not within the area of constitutionally protected speech. **Roth v. U. S.,**[50] **Beauharnais v. Illinois,**[51] **Chaplinsky v. New Hampshire,**[52] **Near v. Minnesota.**[53]

If Messrs. Pennekamp and Knight had heeded **Pennekamp v. State of Florida**[54] instead of gloating that they had reversed the Supreme Court of Florida, they would realize that they had been forewarned. This Court unfurled the red flag appropriate to the instant editorials:

> "For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.."[55][56]

In **Near v. Minnesota,**[57] this Court stated:

> ". . . Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals . . ."

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[50]354 U.S. 476 (1957).
[51]343 U.S. 250 (1951).
[52]315 U.S. 568 (1942).
[53]283 U.S. 697 (1931).
[54]328 U.S. 331 (1946).
[55]*Id.* at 348-349.
[56]It is of academic interest to query whether Mr. Pennekamp and the Herald could have escaped a second contempt if Judge Floyd had determined to make an issue of the second editorial published prior to his ruling.
[57]283 U.S. 697, 719 (1931).

In **Caldwell v. Crowell-Collier Pub. Co.**[6] the Circuit Court of Appeals, interpreting Florida law, stated:

> " . . . Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even vituperated, but the facts cannot be perverted with impunity."

The Herald also invoked Section 13 of the Declaration of Rights, Florida Constitution (RA 1) which provides in part: "every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right."

Section 4 of that same Constitution (RA 1) provides that: "all courts in this state shall be open, so that every person for any injury done him in his . . . reputation shall have remedy, by due course of law."

The instant decision imposed no prior restraint upon the Herald's right to fully speak and write its sentiments on all subjects. The decision merely holds the Herald responsible for the abuse of that right.

SUMMARY

Petitioner was sued for libel by Brautigam for two newspaper editorials directed at his one act of making a motion to suppress a grand jury report; which report

[6] 161 F.2d 333 (5th Cir. 1947).

had not then been accepted and filed, but only tendered for filing. The editorials were published before argument was had on the motion to suppress; before the Court's ruling on the motion and before the report was accepted for filing.

The editorials were false and unfair in point of law and the jury found them false and unfair in point of fact. The law may be uncertain, as petitioner contends, but the principles of truth and fairness are constant.

CONCLUSION

There is an abysmal failure by petitioner to establish even a prima facie basis for certiorari jurisdiction. The jury's finding of actual malice makes moot all subsequent argument concerning legal niceties contained in the defenses to libel. In the absence of absolute privilege, the law affords no defense to a defamation published with actual malice. For the reason and upon the authorities cited herein, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated 27 February 1962.

Respectfully submitted,

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of Counsel

APPENDIX

APPENDIX

CONSTITUTION OF THE STATE OF FLORIDA

Declaration of Rights.

SECTION 4. **Courts open to everyone; remedy for wrongs.**—All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

SECTION 13. **Freedom of speech and press; truth as defense to libel; etc.**—Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions and civil actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, and was published for good motives, the party shall be acquitted or exonerated.

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SECTION 15, ART. IV, FLORIDA CONSTITUTION:

SECTION 15. **Removal or suspension of officers.**—All officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the Governor for malfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, and the

cause of suspension shall be communicated to the officer suspended and to the Senate at its next session. And the Governor, by and with the consent of the Senate, may remove any officer, not liable to impeachment, for any cause above named. Every suspension shall continue until the adjournment of the next session of the Senate, unless the officer suspended shall, upon the recommendation of the Governor, be removed; but the Governor may reinstate the officer so suspended upon satisfactory evidence that the charge or charges against him are untrue. If the Senate shall refuse to remove, or fail to take action before its adjournment, the officer suspended shall resume the duties of the office. The Governor shall have power to fill by appointment any office, the incumbent of which has been suspended. No officer suspended who shall under this section resume the duties of his office, shall suffer any loss of salary or other compensation in consequence of such suspension. The suspension or removal herein authorized shall not relieve the officer from indictment for any misdemeanor in office.

* * * * * *

FLORIDA STATUTES

CHAPTER 770

CIVIL ACTIONS FOR LIBEL

770.01 Notice condition precedent to action or prosecution for libel.—Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying

the article, and the statements therein, which he alleges to be false and defamatory.

770.02 Correction, apology, or retraction by newspaper.—If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

905.49 Duty of prosecuting attorney.—The prosecuting attorney or assistant prosecuting attorney shall attend the grand jurors for the purpose of examining witnesses in their presence, or of giving grand jurors legal advice regarding any matter cognizable by them. He shall also draft indictments.

925.01 Penalty for failure to perform duty required of officer.—Except as otherwise provided herein, any sheriff, constable, justice of the peace, county judge, magistrate, prosecuting attorney, court reporter, stenographer or interpreter, or other officer required to perform any duty as provided in the criminal procedure law who willfully fails, refuses and omits to perform any duty

herein required of such officer to be done and performed, or willfully violates any of the provisions hereof, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each such offense, or be imprisoned in the county jail not exceeding ten days.

* * * * * *

Circuit Judge William A. Herin's Instructions to the Jury Concerning the Law of Libel.

* * * * * *

T. 836:

Gentlemen of the jury, as you have previously been advised, this is a civil action for defamation in which the plaintiff seeks an award of money damages against the defendant newspaper, The Miami Herald Publishing Company.

The plaintiff alleges that two separate editorials pub-

T. 837:

lished two days apart, as set out in the complaint, are false and defamatory, and were published and circulated by the defendant for the purpose of ruining the plaintiff's reputation.

The plaintiff alleges also that the editorials complained of held him up to public hatred, distrust, contempt and ridicule, and deprived him of public confidence, and

as a result thereby he has suffered embarrassment, humiliation, mental suffering, and injury to his profession.

It is further alleged that the defendant knew of the falsity of the published matter at the time of each publication.

Now, gentlemen, the defendant admits the publication of the two separate editorials and, admits that requests for retraction were made. The defendant denies, however, that the editorials were published maliciously.

The defendant also asserts as affirmative defenses that the statements complained of were fairly accurate and substantially true, and that they were published in good faith and from good motives; and second,

That the editorials were published without actual or express malice, and constituted only fair comment upon matters of public interest.

These two defenses of truth, plus good motive and fair comment, are affirmative defenses as to which the defendant has the burden of proof by a preponderance of the evidence.

T. 838:

For definition of Libel per se, gentlemen, Libel per se may be defined as the false and unprivileged publication by letter, newspaper, or other form of writing, of unfounded statements or charges which expose a person to hatred, distrust, contempt, ridicule, or obloquy, or which tend to cause such person to be avoided, or which have a

tendency to injure such person in his office, occupation, business, or employment, and which are such that in their natural and proximate consequence, will necessarily cause injury to the person concerned, in his personal, social, official, or business relations of life, so that legal injury may be presumed or implied from the bare facts of the publication itself.

Libel per se, gentlemen, means that the words are defamatory on their face and need no further explanation.

The defendant who publishes matters that are defamatory on their face is liable to person defamed unless he can prove by a preponderance of the evidence that the written words are true and published for good motives.

With respect to the defense in which the defendant asserts that the complained of statements contained in the editorials were substantially true, and were published with good motives, the Court charges you that the burden of proving this defense is upon the defendant and to establish this defense the defendant is obliged to prove both elements of the defense. That is to say, that the statements contained in the editorials are substantially true

T. 839:

and published with good motives. To sustain this defense the defendant must show not only that the facts stated in the body of the editorials are substantially true, but they must also show the substantial truth of the headlines as construed with the body of the editorials in the respect complained of by the plaintiff.

In order for a publication to be made for good motives, it must appear that the libelous matter was published without malice, recklessness or wantonness. Libelous matter cannot be said to be published with good motives if the accusation proceeds from ill will or ulterior motives, or an intention to do ulterior and unjustifiable harm, nor if said publication is the result of actual malice.

In respect to each of the editorials complained of, if you find that the facts contained in such statements were not substantially true, or, if substantially true, were not published for good motives, without malice or in reckless disregard of the plaintiff's right, or if such statement is libelous, then this defense has not been sustained, and your finding on such issue must be for the plaintiff.

Gentlemen of the jury, one of the defendant's defenses is that the matter was subject to the privilege of fair comment. The acts of public officials are subject to scrutiny and honest criticism. I charge you, therefore, that the editorials were on matters of public interest and

that such matters were subject to fair comment and criticism. As to the defense of fair comment on matters of public interest, the Court charges you that the defendant, as publisher and circulator of a daily newspaper, has the same or no greater right or privilege to make comment upon or publish criticism of the plaintiff's actions than any individual citizen would have. Any statement which would be libelous, if published by an individual citizen, would be libelous, if published in, and circulated through the medium of such a newspaper. Likewise, any statement

of fact, which would not be libelous, if published by an individual, would not become libelous simply because published in such a newspaper. Sometimes it may happen that a person may be damaged by such criticism on matters of public interest; yet, he would have no right of action, if such criticism was an expression of opinion only, and not a false statement of a material fact, or was free from imputation of a corrupt and dishonorable motive, unless the criticism was made with bad motives and for the malicious purpose of injuring the plaintiff.

Gentlemen of the jury, an author may in good faith, fully express his honest views to the public, even though such views are humorous, satirical, or unfavorable. But the comment must be fair.

A criticism or comment is unfair if it goes further than the occasion or the acts commented upon warrant,

T. 841:

or if it makes unfair exaggeration. The comment is fair only when it confines itself to things or to acts or conduct of persons. Comment going so far as to attack personal character or to impute immoral or corrupt motives is unfair and not privileged. In order to constitute fair comment, it must appear that the language complained of must comment upon factual matters, and not a libelous misstatement of material facts themselves. The defense of fair comment must be the expression of an opinion, but must contain no misstatement of any material fact, and must not be an attack upon the character of the individual concerned, or referred to in the comment. It is an essential ingredient of fair comment that the critic

confine himself to criticism and not make his criticism a veil for personal censure, or allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation.

If you find that the language in either or both of the editorials complained of is not free from the imputation of dishonorable or corrupt motives, then I charge you that the defendant has exceeded the bounds of fair comment and you should find for the plaintiff as to the defendant's liability arising from the publication of either or both of the editorials in question.

Gentlemen of the jury, you must consider whether the plain meaning of the words of the editorials published

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by the defendant implied that the plaintiff or his office was personally involved in the grand jury report which was sought to be suppressed.

If you find such an implication in the editorials, then you must decide whether the defendant knew, or should have known, at the time of publication that the plaintiff, or his office, was not involved in the grand jury report mentioned in the editorials.

It is necessary for you to decide these questions because the defendant relies on the affirmative defense of fair comment or honest criticism. But comment or criticism is never fair if it is not the honest belief of the writer, no matter how good his motives or intentions are.

Therefore, I charge you that if you find that the defendant knew or should have known at the time of the publication of the editorials that the plaintiff or his office was not personally involved, and that nevertheless the defendant, having such knowledge, implied that the plaintiff or his office was implicated, then you should find that the defendant cannot avail itself of the defense of fair comment, since the editorials were not the honest belief of the writer.

Gentlemen of the jury, if you find that the editorials complained of meet the test of fair comment or honest criticism, as I have specified that defense to you, the defendant will then have carried the burden of proof, proving his affirmative defense.

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In such event, the burden will lie upon the plaintiff to have proven to you by a preponderance of the evidence that the defendant published the editorials complained of with actual malice.

I charge you that actual malice would destroy any defense interposed in this case by the defendant, since privilege is never an effective cloak for malice.

Now, we will proceed with some definitions of the term "malice."

Gentlemen of the jury, as you have seen, the question of malice and actual malice are important facts in controversy for you to determine. Therefore, I shall in-

struct you as to their definitions so that you may distinguish between legal malice and actual malice:

By use of the term malice in these instructions, as distinguished from actual malice, I advise you that when a defamatory article is published about an individual the law presumes that said article was maliciously published, and the burden is on the defendant to prove otherwise.

This is so, because every person is presumed by the law to have a good reputation until proven otherwise. Therefore, when an article is written which on its face would tend to destroy a person's presumed good reputa-

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tion, the law implies that the article was published with malice. As a matter of fact, this is a mere fiction of the law and is therefore called legal malice.

But it is important that you understand that when the Court speaks of actual malice there is a distinction; and I will now explain to you the meaning of the term "actual" malice.

Gentlemen of the jury, therefore it is important that you fully understand what is meant by actual malice. I charge you that personal animosity and ill will are classic examples of actual malice; however, I admonish you that those are not the only elements which would substantiate the plaintiff's allegation of actual malice.

Actual malice can be determined in other ways. It may be inferred, for example, from the language of the

publication itself, from the failure of the defendant to comply with the necessary request for retraction; from evidence of other defamatory statements published by the defendant about the plaintiff on other occasions; from the evidence of reckless disregard of plaintiff's rights; from the omission of material facts in the articles complained of; from the knowledge of the falsity of imputation of motives where improper motives are unnecessarily imputed; or where there is evidence of improper and unjustifiable motives on the part of the defendant.

Now, express malice, in its legal sense, means a

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wrongful act done intentionally or with evil intent, without just cause, or as the result of ill will or personal spite. Malice does not, however, necessarily imply spite against any individual, but, rather, in many instances, may be inferred from a proof of wanton disregard of the rights of others, which is equivalent to an intentional violation of them. Mere carelessness or simple negligence, standing alone, is not sufficient to supply the inference of malice.

If you find that the language used in the alleged libel is intemperate in character, or that the language used is utterly beyond and disproportionate to the fact, or that there was a deliberate omission of material facts, or that false, corrupt motives were unnecessarily imputed to the plaintiff, plus the defendant's failure to retract, you may be warranted in inferring the existence of express malice.

A corporation is responsible for the acts of its offi-

cers and agents, acting within the scope of their authority, and any malice of any such officer or agents, so acting whether resulting from personal ill-will or evidenced by a reckless and wanton disregard of the plaintiff's rights, may be imputed to the corporation. So, if, in this case, you find that any officer or agent of the defendant, acting within the scope of his employment, was motivated by any personal ill-will toward the plaintiff, or acted in reckless disregard of the plaintiff's right, in publishing or circu-

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lating these editorials, the malice of such officer or agent would be imputed to the defendant by whom he was employed.

If you find from the evidence that the author of the editorials was actuated by actual malice toward the plaintiff, or that he acted in reckless and wanton disregard of the plaintiff's rights, and if you further find, from a consideration of either or both of the editorials, or from any of the other evidence, that the defendant knew, or, in the exercise of reasonable care, should have known of such malice on the part of the author, or such reckless disregard by the author, of the plaintiff's rights, then such malice on the part of the author may be imputed to the defendant.

Gentlemen of the jury, as you have heard, there has been discussion about the admissibility into evidence of publications other than the two editorials being sued upon. Since the issue of actual malice is for you to decide, I have permitted these publications to be considered by you for the sole purpose of helping you to decide whether there

has been malice or lack of malice. As I have permitted the plaintiff to introduce proof of other matter tending to show malice, and in aggravation of damages, since such publications tend to show attitude of the defendant toward the plaintiff, I have likewise permitted the defendant to introduce other publications to show good motive or lack of malice.

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I charge you, therefore, that in evaluating these additional publications, and by that, I mean publications or matter other than the two editorials being sued upon, you must consider them for one purpose only, and that one purpose is to decide whether the defendant, when it published the two editorials complained of, Plaintiff's Exhibit 3, and Exhibit 5, as I recall, was actuated by malice, or was actuated by good motives.

You will recall, Gentlemen of the jury, that the plaintiff alleges that on April 28, 1956, and on April 30, 1956, when the plaintiff was the State Attorney of the Eleventh Judicial Circuit, the defendant published editorials in its newspaper, The Miami Herald, concerning the plaintiff; that the editorials were known to be false and were for the purpose of ruining the plaintiff's reputation as a citizen and public official and maliciously exposed him to public hatred, contempt, ridicule and distrust, with the result that he was deprived of public confidence as a citizen and official, and that the publication caused him to suffer embarrassment, humiliation and mental agony; that the defendant was requested to retract any false matter in the editorials but refused to do so.

The defendant admits that the plaintiff was the State Attorney, and admits that it published the editorials set forth in the complaint, and further admits that it refused to retract them, but denies all the other allegations in the complaint. The defendant further avers that it was com-

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mon knowledge that the Dade County Grand Jury was investigating the official conduct of public officials; that there was widespread public interest in the investigation and report of the Grand Jury; that the editorials concerned the plaintiff's attempt to have the Grand Jury's report withheld from the public; that the editorials were true insofar as they related to factual matters, and that insofar as they consisted of expressions of opinion, such opinions were fair comments, made in good faith and without malice, and, therefore, were privileged publications. The plaintiff's allegations, which are denied, and the defendant's affirmative allegations constitute the issues which you are to decide, and your duty, therefore, is to determine whether or not the publications were true and published in good faith, or constituted fair comment and thereby were privileged communications.

You are instructed that public officials and candidates for public office submit their acts and conduct to the close scrutiny of the public, and newspapers have not only a right, but a duty to utter publications concerning such matters for the benefit of the voting public.

You are further instructed that newspapers are not liable in damages to persons or public officials, including those seeking election to office, for any injury caused by

editorial comment on their acts and conduct, if the comment is based on facts truly stated, and with good motive,

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and the editor's conclusions or inferences are such that a fair-minded man might reasonably draw from the stated facts, and if the comment also constitutes an honest expression of the writer's opinion, and does not impute corrupt or dishonorable motives to said individual.

Now, gentlemen, in the event that your verdict is for the defendant in this case, you would not need to consider the question of the plaintiff's damages. However, if you find for the plaintiff in respect of either or both of the editorials complained of, then you should render a verdict for the plaintiff in such sum as in your sound judgment you find will fairly and fully compensate him for the injury done to his reputation by the tendency of such publication to bring him into disgrace and disrepute, and also on account of its tendency to expose him to public ridicule, disgrace, contempt, or hatred, and distrust, and to injure him in the pursuit of his livelihood.

Gentlemen of the jury, punitive or exemplary damages are awarded not as compensation for a wrong done to a plaintiff, but as punishment for the wrongful conduct of the defendant, as an example tending for the protection of all good citizens from a repetition of similar wrongs.

In addition to claiming actual damages and injury to his good name, credit and reputation, the plaintiff claims punitive or exemplary damages. His claim in this respect is based upon his assertion that the publication and circu-

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lation of these editorials by the defendant was prompted and attended by express malice, or by such reckless disregard of the plaintiff's rights as to be equivalent, in law, to express malice. The burden of proof with respect to this issue is upon the plaintiff, and unless you find from the evidence that the plaintiff has established the existence of such express malice or such reckless disregard of the plaintiff's rights as to be equivalent to express malice, then you are not permitted to include any allowance for punitive or exemplary damages in your verdict. If, however, you find from a preponderance of the evidence, that the defendant was guilty of such express malice, or of such reckless disregard of plaintiff's right, then you may include in your verdict an award for punitive or exemplary damages.

Gentlemen of the jury, if you find that the plaintiff is entitled to recover punitive damages, then, in determining the amount of punitive damages to be awarded, you may take into consideration the financial worth of the defendant.

You should also consider the extent of the plaintiff's injury as found by you in your award of compensatory damages.

Questions of the award for punitive or exemplary damages and of the amount to be awarded therefore are both within the sound discretion of the jury, having in mind the purpose of such award and taking into consideration all of the circumstances of the case. The discretion to award punitive damages is not an unbridled dis-

cretion, but a sound one, to be exercised on consideration of what, under the evidence, would be a reasonable and proper verdict. It must be called to your attention that the amount of damages claimed by the plaintiff in his complaint is two million dollars. This allegation is not evidence. It is merely a claim, and must not be considered by you as evidence, but merely as the maximum limit of the plaintiff's recovery in the event you find he is entitled to recover damages from the defendant.